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IN the death of Justice Miller, the Supreme Court of the United States loses its ablest member. By common consent of all practitioners before that court, he was the chief, though not in name, of that distinguished body, and will take rank with the greatest of the common law judges, including Mansfield, Taney, Story, Marshall and Shaw. And yet, strange to say, the law, as a pursuit, was a sort of after-thought with him, he being educated and having practiced as a physician. At the age of thirty, with a wife and two children, he quit the one profession for the other. Sixteen years later he was selected by President Lincoln, as a man of superior qualifications, for the highest judicial function. He was, in no sense, a liberally educated man. Having none of the advantages of wealth, he made his way from an humble beginning to an exalted reputation by force of his own industry and ability. His youth was spent upon a farm, and his opportunities for gaining knowledge only those presented by the ordinary local schools. Justice Harlan, associated with him for more than twelve years, says: "He was not as learned in the books as some judges." And this is doubtless true. In point of scholarly learning he could not be compared with Story or Curtis. Some of his contemporaries, too, were his equals in technical legal attainments, yet the verdict of history will probably be, that, taking into account all the qualities of his mind and heart, he stood in the front rank of the noted men who have shed lustre upon that tribunal. The tribute of Col. J. O. Broadhead, at a meeting of the St. Louis bar, well expresses the sentiment of lawyers generally:

"If I were asked to picture a perfect judge —that is, as perfect as it is possible for man to be in that important position—a man of strong will, of unflinching courage, of broad views, of strong intellect, of undoubted honesty, of charity for his fellow-men in every condition of life, whether high or low, rich or poor, and of a high sense of justice which would induce him to break through the technical webs of the law when the occasion called for it, that man was Samuel F. Miller."

JUSTICE MILLER had been on the bench twenty-eight years and was seventy-four years of age. He might, under the law, have retired four years ago on full salary for life, but he considered himself capable of good work, and could not contemplate with satisfaction the condition of idleness. He served on the supreme bench with four chief justices —Taney, Chase, Waite and Fuller. Twice he came near being made chief justice himself. One occasion was during the Grant administration, after the rejection, by the senate, of the names of Geo. H. Williams and Caleb Cushing. It is said that Grant would then have appointed Miller had it not been for the jealousy of Justice Swayne, of Ohio, which resulted in the appointment of Waite. Again during the Cleveland administration—and this is probably news to many,—the president seriously considered the propriety of advancing Justice Miller to the chief justiceship.

It is stated that Justice Miller has pronounced more opinions, upon questions of constitutional law and of vital public interest, than any other judge who ever sat on the supreme bench, not excepting Chief Justice Marshall. For many years his influence upon the court has been paramount. Nearly every important decision since the death of Chief Justice Chase has borne the impress of his strong mind, and he has himself framed most of the utterances on constitutional interpretation during that period. The police powers of States were never more clearly stated than they were by him in the celebrated Slaughter House cases. The opinion rendered by him in Kilbourn v. Thompson, on the power of congress to punish for contempt, and which is the leading case on that subject, bears evidence of great and laborious research. So also Loan Association v. Topeka, on the power of municipal corporations to levy taxes and contract debts. His judgment in Kring v. Missouri will be remembered as a new and interesting review of the question as to the effect of a change of procedure in criminal cases, upon offense already committed, as being *ex post facto*. What is known as the "Head Money Cases," involving the construction of acts regulating immigration, was the occasion

of an able opinion by him. One of his more recent opinions is Eilenbecker v. District Court, as to the right of trial by jury in cases of contempt of court. Another, and one in which there was a strong dissent by two of the court, is *In re* Medley, where it was held that a statute of Colorado, enacted after the commission of a murder, which changes or rather adds to the punishment of death, certain other features, is *ex post facto* as to the murder committed. The court went to the length of setting free the condemned murderer, a result which seems open to just criticism. The last notable opinion of Justice Miller is *In re* Neagle, fresh in the minds of all, which, though characterized by great ability, provoked adverse comment in some quarters.

NOTES OF RECENT DECISIONS.

OFFICE AND OFFICER — FEDERAL OFFICER — ELIGIBILITY. — The question has occasionally arisen, whether a retired officer of the United States army is disqualified from holding municipal positions, and in the case of People v. Duane, 24 N. E. Rep. 845, the Court of Appeals of New York hold that an officer of the United States army, retired from active service on three-quarters' pay on account of age, though he still remains a part of the army, and may be appointed to certain duties in connection with the Soldiers' Home, under certain circumstances, and who has not been assigned to any duty by the federal government after such retirement, does not hold a federal office within the meaning of Laws N. Y. 1888, ch. 584, providing that the aqueduct commissioners appointed by the mayor of the city of New York "shall hold no other federal, State or municipal office." O'Brien, J., says, *inter alia:*

> A "public office" has been defined by this court to be "a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer. * * * It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place, and perform the duty, for the term and by the tenure prescribed by law" (*In re* Hathaway, 71 N. Y. 238); and by the Supreme Court of the United States as "a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." U. S. v. Hartwell, 6 Wall. 385; U. S. v. Germaine, 99 U. S. 508. Neither of these definitions, we think, applies to the defendant after his retirement, and at the time the appointment in question was made; and we can find nothing in the circumstance that he was entitled, under the act of congress, to certain rights and privileges, and subject to the rules and articles of war, that brings the case within the policy of the disqualifying clause of the statute, whether that policy was to secure to the State, under the authority of which the appointment was made, the benefit of his individual time and talents, or to guard against the influences to which the occupancy of a federal office might subject him. The decisions cited from the court of claims and the United States Supreme Court (U. S. v. Tyler, 105 U. S. 244), hold that retired officers are in the military service of the United States, in the sense that they are entitled to what is known as "longevity pay." That proposition may be, and is conceded; but it does not prove that such a privilege, secured by special statute, in the nature of compensation for years of past faithful service, makes the beneficiary the incumbent of a federal office. The case of State v. De Gress, 53 Tex. 387, certainly does hold that an army officer on the retired list holds a federal office, within the meaning of a statute of that State similar to the provision contained in chapter 584 of the Laws of 1888. That conclusion was reached, however, by assuming that such a result must necessarily follow from the federal decisions holding that he is in the military service, and a member of the army—considerations which, we think, do not control the question. The defendant did not, in our opinion, hold a federal office, when appointed by the mayor, within the meaning of the statute.

CRIMINAL LAW — LOTTERIES — FOREIGN BOND.—The case of Ballock v. State, 20 Atl. Rep. 184, decided by the Court of Appeals of Maryland, is of interest at the present time, in view of the recent lottery enactments by congress. It was there held that, on an indictment for violation of lottery laws (Code Md. art. 27, §§ 172–184), prohibiting the sale of anything in the nature of a lottery ticket entitling the holder, upon the happening of a contingency, to receive money, property or evidences of debt, evidence that the defendant sold a bond of a foreign government, under which the purchaser would, in all events, receive his principal and interest at a time fixed by chance, and, if a certain wheel of fortune, containing prize numbers, should turn in his favor, a large premium in addition thereto, will sustain a conviction. When the conditions of a bond of a foreign government fall within the condemnation of the police regulations of a State, changing its character to a species of lottery, to prohibit its sale does not violate treaty stipulations, or constitutional provisions as to commerce. Irving, J., says:

Webster defines a "lottery" to be "a distribution of prizes by lot of chance;" and Worcester says "it is a distribution of prizes and blanks by chance;" "a game in which small sums are ventured for the chance of obtaining a larger value." It has been strenuously and ably contended that, because there are no blanks in the wheel, but something of value must always come to the holder of any particular number, it is no lottery ticket. Such does not seem to be the legal acceptation, and under our law it certainly cannot be. In Hull v. Ruggles, 56 N. Y. 424, it is said: "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." Something very inconsiderable could be substituted for the blank, if the defendant's argument was sound, and this would entirely destroy its character as a lottery. Its vicious character would be entirely purged by such substitution. Our statute certainly prohibits such evasion, and prevents a ruling which would sanction such evasion or make it possible. The law of this State, for the purpose of preventing the mischiefs of lotteries are thought to produce, makes anything, partaking of the nature of a lottery, a lottery. It has been vigorously argued that, because the money ventured must all come back, with interest, so that there can be no final loss, it cannot be a lottery, even within the meaning of our law. At some uncertain period determined by the revolution of a wheel of fortune the purchaser of a bond does get his money repaid, but we do not think this deprives the thing of its evil tendency, or robs it of its lottery semblance and features. The inducement for investing in such bonds is offered of getting some "bonus," large or small, in the future, soon or late, according to the chances of the wheel's disclosures. The investment may run one year, or it may run thirty years, according to the decision of the wheel. It cannot be said this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit and a mode of making gain through the chance of dice, cards, wheel, or other method of settling a contingency. It certainly cannot be said that it is not in the "nature of a lottery," and that it has no tendency to create desire for other and more pernicious modes of gaming. Our statute does not justify a court, expressly directed to so construe the law as to prevent every possible evasion, whether designedly or accidentally adopted, in deciding a thing is not a lottery simply because there can be no loss, when there may be very large contingent gains; or because it lacks some element of a lottery according to some particular dictionary's definition of one, when it has all the other elements, with all the pernicious tendencies, which the State is seeking to prevent. Striking at the root of the evil, and to prevent all its possible mischiefs, the statute lays down a different rule from that applied to the construction of other criminal statutes, which is a rule of strict construction. Instead of that rule, the law says this statute is to be construed liberally, in order to prevent the introduction and use of anything in the nature of a lottery, for the making of money or securing property. The case of Kohn v. Koehler, 96 N. Y. 362, was a civil suit under the New York statute to recover double the amount paid by a plaintiff for a bond like the one here involved, and does decide that it did not fall under the condemnation of the New York statute; and Shobert's Case, 70 Cal. 632, 11 Pac. Rep. 786, follows it in construing the California statute. We have examined the statutes of those States, and do not think those cases can or ought to control us in the construction of our statute, which is so essentially different from both the New York and the California law. Even upon the New York statute, we think the reasoning of Judge Davis in the supreme court (21 Hun, 466-470, in Kohn v. Koehler) more convincing and sounder than that of the appellate court, which reversed the supreme court's decision in the case, and we approve the reasoning of the supreme courts. Our State has such a well defined policy respecting lotteries, and regards them, or anything in the nature of them, so detrimental to public and private morals, and so much in the way of the certain and substantial thrift of its citizens, that it has forbidden the dealing in anything partaking of their nature. It has expressly included, as we have already noted, anything of that nature authorized by other States and foreign governments. Its dignity and laws, therefore, ought to be upheld unless the law be, plainly, violation of constitutional obligation or treaty and stipulation. We cannot see that our law is so. It is true the Austrian government bonds are vendible, and ought to be treated as other articles of commerce, as a rule; but, when those bonds are coupled with conditions and stipulations which change their character from simple government bonds for the payment of a certain sum of money to a species of lottery ticket which falls under the condemnation of our statute, it must be classed as its conditions characterize it, and then it is not vendible under our law; and does not violate constitutional provision or treaty stipulation to so hold. All the decisions of the supreme courts make a saving in favor of police regulations, as within constitutional authority. Such bonds as this should be no more protected in their sale than diseased meat or diseased cattle, which no one would contend could not and should not be restricted and punished. They are property, of course, and their possession would be protected, and if disturbed the law would redress. So it would be with Louisiana lottery tickets, which are confessedly not salable; and such bonds should be no more protected in sale than the lottery tickets pure and simple.

The case has been argued as if this defendant was charged to be and is an Austrian subject, and entitled by treaty stipulation to sell and dispose of his property. He is not so charged to be, and, if he was, he would have to be treated exactly as if he was a citizen of the United States, and the State of Maryland. The criminal laws operate alike and equally upon residents and non-residents. As an Austrian, he could not sell lottery tickets in Louisiana lottery, although he might own them, with any more immunity and right than one of our own citizens. Constitutional provisions and treaty stipulations never could have been intended to prevent a State from forbidding that which was deemed injurious to its people.

FEDERAL COURTS—JURISDICTION—CANCELING DECREE OF NATURALIZATION.—In the case of United States v. Norsch, 42 Fed. Rep. 417, the question came before the United States Circuit Court for Missouri, whether the United States can sue in a federal court for the cancellation of a certificate or decree of naturalization which has been obtained by fraud in a State court. Judge Thayer, in deciding in the affirmative, says:

It is contended, however, that the federal courts have no power to nullify decrees of naturalization granted by State courts, although they were obtained by fraud; and, as this contention presents a question that is fundamental in all suits of this character, it will be first considered. I do not understand the claim to be that a decree of naturalization stands upon any different footing than judgments and decrees rendered in other judicial proceedings. It seems to be conceded, and I entertain no doubt, that fraud, when practiced upon a court in the trial of an application for naturalization, will vitiate an order admitting the applicant to citizenship, and that any court before whom such proceedings take place may, on the ground of fraud, mistake, or irregularity, vacate its own orders or decrees in that behalf made, provided such court is one having an inherent power to correct or annul its judgments or decrees, by petition, bill of review, or other similar and equivalent method of procedure. The question chiefly mooted, concerns the right of the federal courts to annul the judgments of State courts, or, what amounts to the same thing, to enjoin a person from exercising a right secured to him by the final judgment, order, or decree of a State court, made in a case over which it has jurisdiction. Fortunately there are what seem to me to be controlling adjudications on this question. In the case of Gaines v. Fuentes, 92 U. S. 10, it was held that the United States circuit court had jurisdiction of an original bill to annul a will as a muniment of title, and to restrain the enforcement of a decree of a State court whereby the will had been established, upon the ground that such decree was obtained by false and insufficient testimony. This decision proceeded upon the ground that, as the suit was essentially a proceeding in equity to impeach a decree on the ground of fraud, and as the courts of the State could entertain such a bill, similar authority was vested in the federal courts, although the decree to be affected by the proceeding was a decree of a State court. In the subsequent case of Barrow v. Hunton, 99 U. S. 82, it was also held that an original bill in equity, brought to set aside a decree on the ground of fraud, may be maintained in the courts of the United States, though the judgment assailed is that of a State tribunal. It was further held, however, in that case, that an attack upon a judgment of a State court cannot be entertained by a federal court, where the proceeding is merely tantamount to a motion to set a judgment aside for irregularity, or to a writ of error, or to a petition or bill of review. Proceedings of the latter character, as a matter of course, are only maintainable in the court where the record remains. Proceedings to nullify judgments of State courts, or to enjoin parties from asserting any rights thereunder, have also been entertained by several circuit courts of the United States. Thus in Amory v. Amory, 12 Amer. Law Reg. (N. S.) 585, Judge Drummond, sitting in the circuit court for the district of Wisconsin, entertained a bill to enjoin parties from asserting any right under a decree of divorce granted in the State of New York, the bill showing that the decree had been fraudulently obtained in the State court. See, also, decisions to the same effect in Smith v. Schwed, 9 Fed. Rep. 483, and Sahlgard v. Kennedy, 1 Mc Crary, 291, 2 Fed. Rep. 295. In view of these authorities, I conclude that it is no objection to an original bill filed in a federal court to enjoin a party from asserting rights under a judgment or decree the on ground of fraud practiced in procuring it, that the judgment or decree in question was rendered by a State court. It follows, of course, that it is no objection to this proceeding that the order of naturalization was entered in the St. Louis court of criminal correction, instead of a court of the United States. On the contrary, the fact that that court has no equity jurisdiction, no power to entertain a bill of review, and probably no power to set aside an order of naturalization, on motion, rather strengthens the right of the government to sue in this court, if in point of fact the fraud complained of is of that character that will ordinarily suffice to invalidate a judgment.

EXEMPTION OF PENSION MONEY.

Sec. 1. Constitutionality of Statute Exempting Pension Money from Execution or Attachment. — Congress has provided by statute, with reference to pension money, that "No sum of money due, or to become due, to any persons, shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in the course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."[1] Concerning the validity of this statute, there is no direct decision of a federal court, to our knowledge, but there is a decision of the supreme court with regard to the embezzlement by a guardian of his ward's pension money, which, in principle, can be applied to this statute. As is well known, a statute enacted by congress makes it a penal offense if the guardian of a minor embezzles the pension money of his ward. It was claimed that the statute was unconstitutional; but the supreme court held that it was not. In passing upon the question, the court expressed an opinion that no one would doubt the validity of the statute exempting pension money from seizure in satisfaction of the debts of the pensioner.[2] In a Massachusetts case it was said: "It is undoubtedly competent for the United States to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner."[3] And in Kentucky it was said: "That congress has the power to attach such condition [exempting it from seizure] to the grant of the bounty, we cannot doubt."[4] "We have no doubt," said the

[1] R. S. 1878, § 4747.
[2] United States v. Hall, 98 U. S. 343.
[3] Kellogg v. Waite, 12 Allen, 529.
[4] Eckert v. McKee, 9 Bush, 355. So statutes relating

Supreme Court of Wisconsin, "of the power of congress to attach to the money donated by it the quality of non-liability to seizure for the debt of the donee. Congress has exempted from local taxation the securities of the government, held by its creditors, and no one now questions the power to do so. The power to exempt pension money from seizure for debt rests on the same principle; and if it exists in those cases, it must necessarily exist in the other."[5]

Sec. 2. Cases Decided Before the Passage of Statute of 1866.—The statute of exemption was passed in 1866, and re-enacted in 1873. Previous to 1866 an agent of a pensioner received from a United States pension agent her pension, and it was held that the act of 1866 did not apply to the exemption of that fund. The court said: "But when this money was paid to the agent of the principal defendant, by her consent, and in conformity with the existing provisions of law, it became her property, and created a debt from the agent to her, over which the United States government had no longer any control or jurisdiction. It was no longer, in the language of the statute of 1866, a 'sum of money due or to become due to any pensioner, under the laws of the United States.' It had been paid, and was received by her in the manner she had chosen. It could not be recalled by the government, nor its disposal be qualified or in any manner limited or abridged. The statute could only apply to future payments 'due or to become due' under the pension laws."[6] There was a statute very similar to the one quoted at the beginning of this article, enacted previous to 1836. While this statute was in force in was sought to attach pension money in the hands of the attorney, a special agent of the pensioner, but the court held that it could not be done. "It is well urged," said the court, "that the pension is a gratuity from the government, and intended for the support and comfort of the pensioner. This consideration shows the propriety of a liberal construction of the act in carrying into effect the benevolent purpose of the government. Creditors have no equitable claim to the fund, but must rely, if they would seize it, upon strict legal right. Any other construction than that which we give, would render the provision in question nugatory and defeat its purpose. It is not supposed that the disbursing officer of the government can be summoned as trustee, independently of this provision; and if the special agent of the pensioner is subject to the process, it is difficult to conceive a case where the provision applies. At the same time, such a decision would enable creditors to intercept the bounty of the government, and defeat the obvious purpose of the law." The court deemed the money in the hands of the pensioner's attorney (it never having reached the latter personally) *in transitu*, "and of course within the protection of the act."[7] In New York a pension was granted by the State government to a policeman. The policeman having failed in business, a receiver for his property was appointed, and the latter collected pension money accruing after the appointment. It was held that the receiver was not entitled to it, and must pay it over to the policeman. "A pension," said the court, "is an allowance without consideration, and the payments of it are not made pursuant to any contract or obligation, but each payment is voluntary, and may be withheld by the government that grants it, pursuant to the conditions attached to the grant. The debtor had no property in any payments to be made on account of the pension, before actual payment. Any sum already paid, on account of the pension, to the debtor, or accrued prior to the appointment of the receiver, may be seized by the latter when such sum has been actually paid to the debtor, but not before."[8]

Sec. 3. Pension Drafts Cashed at a Bank.—A pensioner received his pension checks or drafts from the government, and placed them in a bank, indorsing them. The bank received them, and gave his bank account credit to the amount of the drafts. These drafts were taken or bought in the usual way—in the usual course of banking—and sent for collection. The pensioner then, or in a few days, checked out about one seven-eighths of the amount of the deposit. It was sought to attach the remainder left in the

to extortionate fees are constitutional: U. S. v. Marks, 2 Abb. (U. S.), 534; s. c., 10 Int. Rev. Rec. 42; U. S. v. Fairchild, 1 Abb. (U. S.) 74: s. c., 1 Am. L. J.; 7 Amer. L. Reg. 306.

[5] Folschow v. Werner, 51 Wis. 85.
Kellogg v. Waite, 12 Allen, 529.

[7] Adams v. Newell, 8 Vt. 190.
Nagle v. Stagg, 15 Abb. Pr. (N. S.) 348.

bank, and it was held that it could be done. "Its [the statute] language is not," said the court, "no money in the hands of a pensioner, or 'no pension money,' but 'no sum of money, due or to become due to any pensioner.' The protection is to an undelivered sum of money. This, which is implied in the first words of the section, is made more clear by its after language, for it prohibits seizure whether this sum of money due or to become due remains with the pension office or an officer or agent thereof, or in course of transmission to the pensioner entitled thereto. To guard against any abuse or destruction it then specifies the various positions which money due or to become due can occupy, and in effect declares that pension money shall not be interrupted on its way to the pensioner. The last clause of the section which reads, "but shall inure wholly to the benefit of such pensioner,' is qualified by and must be read in the light of the preceding words of the section. It is comprehensive language, but it is only language strengthening and making more plain the intention of the preceding words. It applies to money due or to become due, and not to money paid and in possession. Nowhere in the section is there reference to pension money in the hands of the pensioner. It does not purport to exempt money in such hands from the operation of the State laws, either those of taxation, or the ordinary statutes concerning exemption and indebtedness, It is doubtless true that such statute is to be liberally construed, and so construed that the pensioner shall acquire full possession of his pension, free from any interception directly or indirectly in the course of its transit. Now turning to the facts of this case, and it is evident that the defendant had acquired full and absolute control of his pension, he had sold it to the bank; it had passed to his general account and he had already used most of it. He had not simply deposited the drafts for collection, but he had sold them to the bank and the bank was his debtor for a balance upon his general account, at the time of these proceedings. * * * The section, as we understand it, simply protects pension money in transit, and here the facts are that the transit was ended, the drafts had been sold and the bank was a debtor in the balance of a general account to the defendant, and hence the bank was liable as garnishee."[9] Like decisions under the same circumstances have been made in Vermont[10] and New Jersey.[11]

Sec. 4. State Statute in Aid of United States Statute.—In New York a State statute provides that "the pay and bounty" of a private or officer "in the military or naval service of the United States" shall be "exempt from levy and sale by virtue of an execution and from seizure for non-payment of taxes, or in any other legal proceedings." A pensioner, who does not seem to have been a soldier at the time, received a draft in payment of his pension, from the government, placed it in a bank and the amount thereof was passed to his credit on the bank books in the usual way, it not being made a special deposit. It was sought to reach the fund in bank by proceedings supplementary to execution, but it was held to be exempt. "We are unable to discover any fact or circumstance in the transaction," said the court, "from which it can be held that the exemption which the statute has created in favor of the appellant, exempting this money, has been removed, or by which it can be reasonably concluded that he intended to convert the money which he received on the draft into a mere loan to the bankers. The currency in which a pension may be paid by the government seldom passes into the hands of the pensioner, as it would be, in most instances, inconvenient for the recipent to attend at the place of payment and receive the money at the hands of the officers authorized to pay such drafts. The purpose of the government in sending instruments of this character to pensioners, is to enable them to realize on the draft, at or near their homes without any cost or delay, and to secure this end the remittance is made in the form of a commercial paper, which can be readily used as the equivalent of cash. It would be manifestly unjust to hold that cash items in the hands of the payee of such a draft, received from his indorser, were not, within the sense and meaning of the statute, money paid him by the treasurer on whom it was drawn. The money undrawn in the hands of the banker,

[9] Cranz v. White, 27 Kan. 319; s. c., 41 Am. Rep. 403. Opinion by Justice Brewer.

[10] Martin v. Hurlburt, 60 Vt. 364; s. c., 14 Atl. Rep. 649.

[11] State v. Fairton Saving Fund and Building Association, 44 N. J. L. 376.

is the pay and bounty of a soldier, and is entitled to the protection of the statute which the appellant invokes as against the demands of his creditors. He has made no attempt to use the money in question in business, nor sought to loan or invest it in any form or manner. The memorandum delivered to him by the bank is not in a commercial sense a certificate of deposit, nor was it intended to be, for the appellant was authorized to draw against the deposit without the return of the certificate. It is nothing more than a teller's ticket, issued in the hurry of business, and does not purport to show the real transaction between the parties. It would be difficult to formulate a general proposition by which to determine when the pay and bounty of a soldier has lost the protection of the statute; each case must be adjudicated upon its own state of facts." The court proceeds to say of the federal statute that it "is limited to protecting and exempting pension money from levy and seizure while it remains in the pension office or in the hands of government officials, and in the course of transmission to the pensioner entitled thereto. After the money is paid over the United States law ceases to be operative, and the right of exemption after that, if any exists, must be found in the laws of the State where the soldier resides."[12] So where pension money and a pension draft were deposited in a bank in this same State, under an agreement that interest should be allowed thereon, it was held by a divided court that the amount was exempt.[13] In Iowa, pension money in the hands or a pensioner, or while deposited, loaned or invested by him is exempt, even the homestead purchased with such money is exempt. While it was conceded that he could make a valid gift of it, under this statute, yet it was held void so far as it related to a gift made before its passage and invested in real estate. In such a case the creditor was held to have an equitable lien upon the land.[14]

Sec. 5. Property Purchased with Pension Money.—The federal statute does not extend to the protection of property purchased with pension money.[15]

Sec. 6. Fraudulent Transfer of Pension Money or the Proceeds of a Pension.—A case kindred to the one under discussion, is the fraudulent transfer of pension monoy in order to defeat the pensioner's creditors seizing the money in satisfaction of their claims. Thus a pensioner, on receipt of his pension money, took it and paid off therewith an incumbrance on his wife's real estate. It was held that so much of the money as he appropriated to the payment of the incumbrance on his wife's land was a fraud upon his existing creditors. "With the money in his hands, said the court, "as he own unincumbered property, the pensioner stands upon the same footing for its protection as would any other man. He may no doubt purchase with his money any property which our State laws exempt from attachment, and hold it as such. Further than that the guardianship does not extend. He is accountable to his creditors precisely as any other debtor possessing money would be. The counsel for the defendants contend that it does not defraud a creditor for his debtor to give away property which the creditor cannot attach. There can be no doubt of that proposition. The answer is, that the money is exempt from attachment before it is received and not afterward. Nor would it be very practicable to extend a protection further than before indicated. Certainly the money could not be protected in its transition from property to property. The moment its identification is gone, the protection confessedly ceases. If the money goes into attachable real estate, such estate may be taken for the pensioner's debts. There would surely be some ground for saying that there might be an unfairness in extending the protection to the limit contended for. If the money be exempted against any debts, it would be against all attachments and all debts. And the pensioner may have obtained credit from the very fact of the possession of the property acquired in this way."[16] Similar decisions have been

[12] Burgett v. Fanchor, 35 Hun, 647; Wildrick v. De Vinney, 18 N. Y. Wh. Dig. 355.

[13] Stockwell v. National Bank of Malone, 43 Hun, 583.

[14] Goble v. Stephenson, 68 Ia. 270. To same effect Baugh v. Barrett, 69 Ia. 495. See Perkins v. Hunkley, 71 Ia. 498; s. c, 32 N. W. Rep. 469. Johnson v. Elkins, 13 S. W. Rep. 448.

[15] Cavanaugh v. Smith, 84 Ind. 380; Fanrote v. Carr, 108 Ind. 124; s. c., 6 West. Rep. 281; 9 N. E. Rep. 350; Wygant v. Smith, 2 Lans. 185; Yates County National Bank v. Carpenter, 49 Hun, 40; s. c., 1 N. Y. Supl. 733.

[16] Friend v. Garcelon, 77 Me. 25; s. c., 52 Am. Rep. 789.

made in other States, where land is conveyed to the wife, which has been purchased by him with his pension money.[17] If the amount of the pension given away is less in amount together with all his property, than the debtor is allowed under a State statute to claim as exempt, the gift is not fraudulent.[18] But in New York where, as we have seen, pension money is exempt, the pensioner may make a gift of it to his wife, and if she invest it in real estate, such property cannot be reached by his creditors.[19] Yet if he invest it in property, such property is subject to levy and sale.[20]

Sec. 12. Pension Money in Hands of Pensioner or his Bailee.—Pension money in the hands of the pensioner is liable for his debts, and can be taken on process for that purpose. If he deposits it in bank it may be reached.[21] Where a statute prohibited the husband giving his wife property to be held as her sole and separate property, and the attorney of the pensioner, with his consent, took the pension draft and went with his wife to the bank and deposited a part of it in her name, giving the rest to her, it was held that the amount in the bank was liable for his debts.[22] So money deposited by the pensioner in the hands of a bailee, in special deposit, may be seized on process for the pensioner's debts.[23] Yet where a pension agent gave a check in favor of a pensioner to A, payable to the pensioner's order, and A, the same day, brought it to a bank with the pensioner's name thereon and deposited the proceeds thereof in her name, it was held exempt.[24] So pension money in his actual possession was held exempt.[25] The fact that the pensioner was a deserter, does not alter the status of his pension fund.[26]

Sec. 13. English Decisions — Receiver.—We have already seen that a receiver cannot be appointed for a pension before it is due; and if he is, he is not entitled to receive it. The pensioner has a right to insist upon his receipt of the pension, and cannot be deprived of it by the forms of the law. A recent English decision places the right in clear light. By statute it was provided that "No pension granted or continued by government * * * on account of past services * * * and no money due or to become on account of any such pension, shall be liable to seizure, attachment or sequestration by process of any court in British India at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of such court." It was further provided that "All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension * * * mentioned [in the quotation above] in respect of any money not payable at or before the making thereof, on account of any such person * * * or for giving or assigning any future interest therein, are null and void." It was still further provided that "Every assignment of, and every charge on, and every agreement to assign or charge any * * * pension payable to any officer or soldier of any of Her Majesty's force, or any pension payable to any such officer * * * or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a royal warrant for the benefit of the family of the persons entitled thereto, or as may be authorized by any act for the time being in force, be void." It was sought to appoint a receiver for the pension of a retired army officer (who could not be called upon to serve in the army) yet to accrue, but it was held that this could not be done, reversing the decision of Lord Denman. We can do nothing better than make a few quotations from Justice Lindley's opinion: "The section makes void all assignments of and charges on, and

[17] Triplett v. Graham, 58 Ia. 135) Hissen v. Johnson, 27 W. Va. 644; s. c., 55 Am. Rep. 327; Sims v. Walsham, 3 S. W. Rep. 557; Dramond v. Palmer, 44 N. W. Rep. 819.

[18] Fanrote v. Carr, 108 Ind. 123; s. c., 9 N. E. Rep. 350.

[19] Whiting v. Barrett, 7 Lans. 106.

[20] Wygant v. Smith. 2 Lans. 185; Yates County Nat. Bank v. Carpenter, 49 Hun, 40; s. c., 1 N. Y. Supl. 733. Touching exemption of pension money after the death of the pensioner, see Matter of Winans, 5 Den. 138; Hodge v. Leaning, 2 Dem. 185. In Ellroy's Appeal, 67 Pa. St. 367, it is held that the half-pay of an officer of the government is not liable to be taken by his creditors.

[21] State v. Fairton Saving Fund and Building Association, 44 N. J. L. 376; Crane v. Inhabitants of Linneus, 77 Me. 59; Webb v. Holt, 57 Ia. 712.

[22] Spelman v. Aldrich, 126 Mass. 113.

[23] Rozelle v. Rhodes, 116 Pa. St. 129; s. c., 9 Atl. Rep. 160; Crane v. Inhabitants of Linneus, 77 Me. 59.

[24] Eckert v. McKee, 9 Bush, 355, overruled in Robinson v. Walker. 82 Ky. 60; Hudspath v. Harrison, 6 Ky. L. Rep. 304; Harold v. Skiller, *Id.*, 666.

[25] Folschow v. Werner, 51 Wis. 85. See dictum in Hayward v. Clark, 50 Vt. 612.

[26] Youmans v. Boomhower, 3 J. & C. 21.

agreements to assign or charge such pensions. It does not in terms apply to executions or attachments, but officers' pensions are not debts attachable in the ordinary way;[27] and there is no method of taking such pensions in execution unless it be by reason of a sequestration or a receiver." "Turning to the authorities, they show that where the pension of a retired officer, whether naval, military or civil, is not made inalienable by statute, it is alienable, and a receiver of what was already become payable may be properly appointed.[28] A distinction has also been drawn between half-pay and a retiring pension. The first has been decided to be inalienable even at common law, and therefore not seizable;[29] whilst, as already stated, the last has been held to be alienable, and therefore seizable, when alienation is not prohibited. The distinction drawn between half-pay and a retiring pension turns on the fact, that, speaking generally and without reference to any particular statute, the first is not alienable, whilst the second is.[30] But if by any particular statute, a retiring pension is alienable, there is no authority to show that it can be taken in execution; and the reason for the difference between half-pay and retired pay as regards liability to be taken in execution, ceases to exist." "It appears to me, therefore, both on principle and on authority, that the pensions of these defendants being made inalienable by statute, are not liable to be taken into execution either through an order for a receiver or in any other way. The court was asked to appoint a receiver of the sums which become due and payable in October last. But that would not be right, for they would have been paid to the defendants in the ordinary course before now if it had not been for the order under appeal, which order ought never to have been made. The pensions being inalienable by statute, the court ought not to restrain the defendant from receiving them, and thereby do indirectly what the statute prohibited from doing directly."[31] By statute the East Indian company was authorized to make a gratuitous allowance to certain persons who had served them, which allowance was required to be charged to the company on its books. It was held that this was not a "debt," within the meaning of the Common Law Proceedings Act of 1854, which could be attached.[32] Such a claim does not, it was said, pass to the pensioner's assignees in bankruptcy;[33] and an assignment of all his property by a pensioner, except his pension, is an act of bankruptcy within the meaning of the English act.[34] A pension allowed a retiring clerk under the Incumbent's Resignation Act of 1871, was chargable upon the revenues of the benefice, and it was provided that it "shall be recoverable as a debt at law or in equity, from the incumbent of the said benefice by the retired clerk, his executors, administrators and assigns, * * * but shall not be transferable at law or in equity." In an action by a retired clerk against the incumbent of the benefice for payment of the arrears of the pension that had been allowed him, it was held that the incumbent could not set off against such arrears a judgment debt previously due to him from the retiring clerk.[35] Where a statute prohibited absolutely the assignment of a pension, and declared that the attempt should be void, the court refused to restrain his receipt of the pension.[36] Even where no statute prohibited the assignment, it was held that an assignment of an officer's half-pay could not be made, and his creditors could not compel him to include it in his schedules in bankruptcy. "I am clearly of the opinion," said Lord Kenyon, "that this half-pay could not be legally assigned by the defendant, and consequently that the creditors are not entitled to an assignment of it for

[27] Citing Inness v. East India Co., 17 C. B. 351, and *Ex parte* Hawkes, L. R., 7 Ch. 214.

[28] Citing Willcock v. Terrell, 3 Ex. Div. 323; Dent v. Dent, L. R., 1 P. & D. 366; Spooner v. Payne, 1 De G. M. & G. 383; Carew v. Cooper, 4 Giff. 619; and Heald v. Hay, 3 Giff. 467.

[29] Citing Flarty v. Odlum, 3 J. R. 681; Lidderdale v. Duke of Montrose, 4 T. R. 248; McCarthy v. Goold, 1 Ba. & Be. 387; and Wells v. Foster, 8 M. & W. 149.

[30] Citing Wells v. Foster, *supra*.

[31] Lucas v. Harris, L. R., 18 Q. B. Div. 127; S. C., 56 L. J. Q. B. Div. 15; 55 L. T. (N. S.) 658; 35 W. R. 112; 51 J. P. 261. Statutes somewhat similar to these have been enacted by congress. See Rev. Stat. § 4766.

[32] Inness v. East India Co., 17 C. B. 351; S. C., 23 L. J. (C. P.), 154.

[33] Gibson v. East India Co., 7 J. Scott, 74; S. C., 5 Bing. N. C. 262.

[34] *Ex parte* Hawkes, L. R. 7 Ch. 214.

[35] Gathercole v. Smith, 17 Ch. Div. 1.

[36] Lloyd v. Cheetham, 3 Giff, 171. This was the 47 Ga. 3 chs. 25, 34. It was held not to apply to a pension granted by the East Indian Company; and consequently an assignment was valid. Heald v. Hay, 3 Giff, 467; Carew v. Cooper, 4 Giff, 619.

their benefit. Emoluments of this sort are granted for the dignity of the State, and for decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for pensioners, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. Besides, an officer has no certain interest in his half-pay; for the king may at any time strike him off the list. Indeed, assignments of half-pay have been frequently made in fact, but they cannot be supported in law. It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned."[37] So the profits of an ecclasiastical benefice do not pass to the assignees under an insolvent act, though included in the schedule,[38] So a compensation granted to a public civil officer is not assignable by him.[39] Under the statutes quoted at the beginning of this section, the pension of an officer in the Indian army, is not liable to sequestration for payment of costs and permanent maintenance.[40] On the other hand it has been held that while the half-pay of an officer is not assignable or attachable, on principles of public policy, yet a writ of sequestration was issued and the pensioner restrained from receiving the pension, leaving it optional with the lords of the treasury to pay it to the person designated by the court to receive it.[41] In some few instances a statute expressly authorized the assignment or seizure of the pension.[42] So a like order, as above described was made concerning a pension, payable yearly to a pensioner for past services, such a pension being held liable to a seizure at the instance of judgment creditor.[43] The court approved a remark of Baron Parke, viz: "A man may assign a pension given to him entirely as a compensation for past services, whether granted to him for life or during pleasure."[44] A decision following this was rendered in Dent v. Dent,[45] which the court of Queen's Bench distinguished in Lucas v. Harris,[46] on the ground that it was a decision relating solely to a pension granted for past services.

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[37] Flarty v. Odlum, T. R. 681; Stone v. Lidderdale, 2 Anstr. 533. This rule was applied to the future half-pay of an officer. Lidderdale v. Duke of Montrose, 4 T. R. 248. These cases overrule Stuart v. Tucker, 2 W. Bl. 137, when such an assignment was deemed good in equity. The full pay of an officer cannot be assigned as an annuity. Barwick v. Reade, 1 H. Bl. 627.

[38] Arbuckle v. Cowtan, 3 B. & P. 321. An early remark of Lord Hardwicke, was that "If an officer in the army should become bankrupt, he should have no doubt but that he had power to lay his hands upon his pay for the benefit of his creditors." *Ex parte* Butler, 1 Atk. 210, 214.

[39] Wells v. Foster, 8 M. & W. 149; Davis v. Duke of Marlborough, 1 Swanst. 74. (Pension granted to the Duke by Queen Anne.)

[40] Birch v. Birch, L. R., 8 P. D. 163.

[41] McCarthy v. Goold, 1 Ba. & Be. 387.

[42] Spooner v. Payne, 1 De G. M. & G. 383; s. c., 2 De G. M. & G. 439; *Ex parte* Batline, 4 B. & Adol. 690.

[43] Willcock v. Terrell, L. R., 3 Exch. Div. 323.

[44] Wells v. Foster, 8 M. & W. 149, 152; s. c., 10 L. J. Exch. 216.

[45] L. R., 1 P. & D. 366.

[46] *Supra.*

INSOLVENCY—DIVIDENDS TO CREDITORS—COLLATERAL SECURITIES.

PEOPLE V. REMINGTON.

New York Court of Appeals, June 3, 1890.

A creditor of an insolvent estate is entitled to prove and receive a dividend upon the full amount of the debt due from such estate, regardless of the value of any collateral securities in his possession.

GRAY, J.: The only question presented for our consideration and determination by this appeal is whether the creditor of this insolvent corporation was entitled to prove and receive a dividend upon the full amount of the debt due from the insolvent estate, or whether the receivers, as the personal representatives of the insolvent, could reduce the claim of the creditor, for the purposes of a dividend, by compelling a deduction from the amount of the proved debt of the value of collateral securities, or of any proceeds thereof. There are conflicting decisions upon this question in the courts of the United States; and in England, if we look back up the current of opinions, we may find some differences in views. But the preponderance of authority is in favor of the view that the creditor has the right to prove and have dividends upon his entire debt, irrespective of the collateral security. In this State the precise question is without any controlling precedent. Two cases decided by the special term of the supreme court are to be found in the reports which perhaps bear upon the question. They arose under general assignments for the benefit of creditors, and are conflicting. It may be said therefore, that the field is open to to us for review and determination. I think we

must conclude that the view which I have mentioned as having the weight of authority in its favor is the one best according with the principles and established rules of equity jurisprudence, to which department of legal science the question pertains. Some confusion of thought seems to be worked by the reference of the decision of the question to the rules of law governing the administration of estates in bankruptcy, but there is no warrant for any such reference. The rules in bankruptcy cases proceed from the express provisions of the statute, and they are not at all controlling upon a court administering in equity upon the estates of insolvent debtors. The bankrupt act requires the creditor to give up his security in order to be entitled to his whole debt; or, if he retains it, he can only prove for the balance of the debt after deducting the value of the security held. The jurisdiction in bankruptcy is peculiar and special, and a particular mode of administration is prescribed by the act. To administer, in cases of insolvency coming within the jurisdiction of courts of equity, by analogy with the modes of bankruptcy courts, is not required; and their precedents are not to be deemed as causing any change in the rules established by courts of equity for the marshaling and distribution of assets.

Suggestion is also made of a principle of equity as controlling upon the question. It is that, where the creditor has two funds of his debtor to which he can resort for payment, and another creditor has a lien on one fund only, equity will compel a resort by the first creditor to that fund to which the lien of the other does not extend. But that is not exactly this case; nor is the principle, if it were, decisive. The author whose statement of the principle is quoted from has limited its application to such cases where to compel the first creditor to resort to the one fund will not operate to his prejudice, or trench upon his rights. 1 Story, Eq. Jur. § 633. Judge Story assigns as a reason for the application of the principle that, by so compelling the creditor to satisfy his claim out of one of the funds, no injustice is done to him in point of security or payment. The learned author's reason negatives the proposition that a secured creditor shall lose or forego any advantage which he may have by reason of his security, and through which the fullest satisfaction of his debt can be obtained. In Evertson v. Booth, 19 Johns. 486, Spencer, C. J., held with reference to the equitable rule invoked by the appellants here, that it is not to be enforced if it will "in the least impair the prior creditor's right to raise his debt out of both funds," and he emphatically remarked: "I know of no principle of equity which can take from him any part of his security until he is completely satisfied." Where could any such principle have its origin? The agreement between the debtor and the creditor was that a debt should be paid. That debt is a definite quantity, and nothing less than its full amount can be said to be the debt. It is not altered or affected in its amount because the creditor may hold some collateral security. That is not a factor of the debt, but merely an incident to the debt. The very force and meaning of a collateral security are in the idea of a guaranty of the performance of the principal agreement, which was to pay the debt. The property which a creditor holds as collateral to the indebtedness of his debtor secures him to that extent in case his debt is not paid in full by the debtor or by his estate. As between the creditor and his debtor, the latter could not compel the former to resort first to his collaterals before asserting his claim by a personal suit. The debtor has no control over the application of the collaterals. It is the general rule of equity that the creditor is not bound to apply his collateral securities before enforcing his direct remedies against the debtor. 1 Story, Eq. Jur. § 640; Lewis v. U. S., 92 U. S. 618. Then, on what principle can we hold that because the debtor becomes insolvent the contract with his creditor is changed, and that the creditor cannot, under those circumstances, enforce his direct claim against the debtor until he has realized on his securities? Is the rule capable of such inversion? I cannot see any reason in the proposition. I do not see why, in the absence of intervention by positive or statutory law, the engagements of parties should be varied. If in bankruptcy another method was prescribed by the statute for the proof and payment of debts, it was a matter purely within the discretion of the federal legislature. Its constitutional right to establish uniform laws on the subject of bankruptcies throughout the United States obviously included the power to prescribe the mode of marshalling the insolvent's assets for distribution among creditors; and, being the law of the country, it becomes a part of every contract. But this furnishes no reason why the established rules of courts of equity should be changed in the administration of the estates of insolvents.

In Kellock's Case, L. R. 3 Ch. 769, (decided in 1868), it was held that, in the winding up of a company under the companies act of 1862, a creditor holding security might prove for the whole amount due to him, and not merely, as in bankruptcy for the balance remaining due after realizing upon or valuing his security. In Greenwood v. Taylor, 1 Russ. & M. 185 (decided in 1830), it had been held that the practice in bankruptcy furnished a precedent which should be followed in the administration of assets; but in Mason v. Bogg, 2 Mylne & C. 447 (decided in 1837), Lord Chancellor Cottenham said "that the principle which the decision in Greenwood v. Taylor professes to follow cannot be the principle of a court of equity is further proved by the circumstances that in bankruptcy a particular mode is prescribed. A creditor may there prove, but then he must give up his security; or he may obtain an order that his security should be sold, and that he should prove for the difference. In equity, however, a party may come in and prove without

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giving up or affecting his securities, except so far as the amount of his debt may be diminished by what he may receive." Mason v. Boggs was a case of the administration of the insolvent estate of a deceased person; and Lord Cottenham, further remarked, as to the rights of a mortgage creditor: "A mortgagee has a double security. He has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see." Then Sir William Page Wood, speaking in Kellock's Case, *supra*, of the decision in Greenwood v. Taylor, said. "This court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a court having a peculiar jurisdiction, established for adminstering the property of traders unable to meet their engagements, which property that court found it proper and right to distribute in a particular manner—different from the mode in which it would have dealt with in the court of chancery. * * * We are asked to alter the contract between the parties by depriving the secured creditor of one of his remedies, namely, the right of standing upon his securities until they are redeemed." So, in this country, we find that rule more generally prevailing which allows the creditor holding securities to prove and to receive his dividend on the whole debt. It is asserted in Judge Story's work on Equity Jurisprudence (section 564*b*), and in the following cases: *In re* Bates, 118 Ill. 524, 9 N. E. Rep. 257; West v. Bank, 19 Vt. 403; Moses v. Ranlet, 2 N. H. 488; Findlay v. Hosmer, 2 Conn. 350; Logan v. Anderson, 18 B. Mon. 114. In Patten's Appeal, 45 Pa. St. 151, it was held in relation to an assignment made for creditors that the unsecured creditor has no right to the benefit of the securities held by another creditor until that other's whole debt was paid. In Allen v. Danielson, 15 R. I. 480, 8 Atl. Rep. 705, which was a case arising under an insolvent assignment, Durfee, C. J., delivering the opinion of that court said: "According to the decided weight of authority the rule is to allow all the creditors to bring in their claims in full, and have dividends accordingly." That opinion is both well considered and able: and it deliberately overruled a prior decisions of the court in the case of *In re* Knowles, 13 R. I. 90. The learned chief justice admitted the error into which they had previously fallen, and remarked that they would have decided the case differently if they had then, as now, the same array of authorities presented, and that, in adopting the other view, not only the correct rule would be established, but the rule which was generally prevalent elsewhere. The counsel for the appellants finds decisions by the courts of Massachusetts, Iowa, and Maryland which undoubtedly conflict with the views we incline to. But I think that, whether we look at this question in the light of reason or of the adjudged cases, the rule which best commends itself to our judgments is that which leaves the contractual relations of the debtor and his creditors unchanged when insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement. The creditor is entitled to prove against the estate for what is due to him, and to receive a dividend upon that amount. If the collateral securities are more than sufficient to satisfy any deficiency in the payment of the debt from the dividends, the personal representatives may redeem them for the benefit of the estate. The order appealed from should be affirmed, with costs. All concur (Ruger, C. J., in result), except Earl and O'Brien, J J., taking no part.

NOTE.—As stated in the principal case, the authorities are in conflict in their decisions upon this question. Some of them state the proposition very plainly, that, if a creditor has two funds, out of which he may make his debt, he may be required to resort to that fund, upon which another creditor has no lien, and out of the other fund can only claim a dividend upon the amount of his debt which then remains unpaid.[1] This rule, it is generally held, does not apply when it works injustice to the creditor who can resort to the two funds.[2] It is only applied at the instance of another creditor, and is never enforced upon the suggestion of the debtor nor of his assignee who stands in his shoes.[3] In many of the cases decided, such creditor had a prior lien on both funds, so as to him it was immaterial whether the rule was enforced, since he would be entitled to satisfaction in full before the other creditors could assert their rights;[4] but in other cases the rule is stated broadly without reference to the question of priority.[5] As stated before, the securities or assets will never be marshaled to the prejudice of such creditor, or so as to suspend or put in peril his claim, or upon any other terms than giving him entire satisfaction. It must be clear that the creditor can sustain no loss, nor be in any way delayed, or have his claim subjected to any additional peril.[6] Such marshaling will not be allowed when it will work injustice to the common debtor.[7] The funds must both belong to the common debtor. When a creditor of a corporation cannot resort to its stockholders, he cannot compel another creditor, who has such remedy, to use it to relieve the funds of the corporation for his benefit.[8] When a mortgagee has a two-fold lien from two mortgagors, one of whom is surety for the other, a subsequent mortgagee, who has a lien on the principal's estate alone, cannot compel him to seek payment from the surety's estate.[9] Where the rule of marshaling assets is enforced, the creditor may release his lien on one fund without affecting the claim on the other, if he is ignorant of the

[1] Wurtz v. Hart, 13 Iowa, 515; Bell v. Fleming, 12 N. J. L. 490.

[2] Clarke v. Bancroft, 13 Iowa, 320; Miller v. Clarke, 37 Iowa, 322.

[3] Paddock v. Bates, 19 Ill. Ap. 470; General Ins. Co. v. United States Ins. Co., 10 Md. 517.

[4] Harrison v. Skillman, 33 Barb. 378; Evertson v. Booth, 19 John. 486.

[5] Ellis v. Temple, 4 Cold. 315; 1 Story's Eq. Jur. § 633.

[6] German Ins. Co. v. United States Ins. Co., 10 Md. 517; Ramsey's Appeal, 2 Watts, 228.

[7] Dickson v. Chorn, 6 Iowa, 19.

[8] Carter v. Neal, 24 Ga. 346.

[9] Woolen v. Hillen, 9 Gill, 185.

claim of another creditor, which is confined to the latter fund;[10] another authority holds he may do so without prejudice, unless a petition or bill has been filed to compel such marshaling.[11] When the creditor and debtor have already in good faith applied the money, it is too late for another creditor to interfere.[12] There is no doubt that the weight of authority is in favor of the conclusion reached in the principal case, that a creditor who has securities to protect him may prove up against an insolvent or assigned estate the full amount of his claim, and is entitled to receive dividends on such full amount.[13] It is immaterial that he has realized a part of his claim from the securities prior to the declaration of a dividend from the estate.[14] In one case, where this right was recognized, the creditor was allowed a dividend only on the balance of the debt; but this was owing to the terms of the assignment.[15] Of course the creditor is entitled to no more than his full debt, and any excess which he may receive from any source he holds in trust for the estate. If the secured debt is so reduced by dividends that the security will more than pay it, the assignee or personal representative should redeem it for the benefit of creditors.[16] It is held that the security is something collateral, which does not reduce the debt, but only secures the creditor *pro tanto* in case the debtor or his estate does not pay the debt in full.[17] It is also said that as a creditor he has the same abstract right to the proceeds of the assignment as any other creditor. He is as meritorious in every respect as they; and because he was more vigilant or cautious in requiring security, it is no reason why he should be put in a worse condition than the other creditors by having his debt postponed and his payment delayed, till by a proper proceeding he can realize out of the property, upon which his debt is secured, while the other creditors are paid in cash.[18] It seems to us that all this reasoning is based upon the idea that such secured creditor is protected by contract, and therefore the law will allow him to hold on to such rights. Equity, however, proceeds on the idea that there are no contractual rights, and its endeavor is on the contrary to equalize the parties wherever possible. If such secured creditors are subject to the rules of equity, it seems proper that as to the excess of their debts above their securities they should stand as other creditors. The bank laws so provide, and the legislation of many States, as Massachusetts, New Hampshire, Vermont and Texas so provide.

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[10] Ingalls v. Morgan, 10 N. Y. 178; Clarke v. Bancroft, 13 Iowa, 320.
[11] Teny v. Woods, 6 Sm. & M. 139.
[12] Bank of Muskingum v. Carpenter, 7 Ohio, 21.
[13] Keim's Appeal, 27 Pa. St. 42; Graeff's Appeal, 79 Pa. St. 146; Paddock v. Bates, 19 Ill. Ap. 470; Midgeley v. Slocomb, 32 How. Pr. 423; Allen v. Danielson, 15 R. I. 480.
[14] Graeff's Appeal, *supra*.
[15] Midgeley v. Slocomb, *supra*.
[16] Allen v. Danielson, *supra*.
[17] Allen v. Danielson, *supra*.
[18] Paddock v. Bates, 19 Ill. Ap. 470.

JETSAM AND FLOTSAM.

JUSTICE HARLAN ON JUSTICE MILLER.— Justice Harlan is reported by the *New York Tribune* to have said of the late Justice Miller: "He had a very bold, aggressive mind, which was shown in his treatment of law questions as well as in his treatment of questions outside of the law. I do not remember any instance since I have been with him upon the bench when he hesitated in the slightest degree to follow out to their legitimate results any conclusions which he ever reached on a question of law. He was not as learned in the books as some judges, but he had a natural aptitude for law. He saw very readily and promptly the real issues of a case and determined them in his own mind without much hesitation. I think that is true in the main, though at times there were questions also on which he expressed doubt. But when upon reflection he reached a conclusion that satisfied his own mind he was prepared to announce it, and stand by it whatever might be the consequences. It is difficult to recall the particular cases that illustrate the mental characteristics, but I do remember the cases which are generally regarded by the profession as those in which he delivered his best opinions, his strongest opinions. There was the famous slaughter house case, involving the construction of that clause in the fourteenth amendment, which says that 'no State shall deprive any person of life, liberty or property without due process of law.' He led the majority in that case, and I am quite sure from what I heard him say on different occasions that he regarded it as the ablest opinion he ever prepared. He wrote a large number of opinions involving the commerce clause of the constitution. It is safe to say that no judge in the country has ever delivered a larger number of opinions in cases involving great constitutional questions. It is also safe to say that, with the exception of Chief Justice Marshall, no American judge has made a deeper impression upon the jurisprudence of this country than he has."

RECENT PUBLICATIONS.

RIGHTS, REMEDIES AND PRACTICE at Law, in Equity and under the Codes. A Treatise on American Law in Civil Causes, with a Digest of Illustrative Cases. By John D. Lawson, Author of Works on Presumptive Evidence, Expert Evidence, Carriers, Usages and Customs, Defenses to Crimes, etc. In seven volumes. Volume 6. San Francisco: Bancroft-Whitney Co. Law Publishers and Law Booksellers. 1890.

This volume will be found of great practical value to the real estate lawyer, for it contains within pages a succinct statement of the law pertaining to the subjects of real property, title thereto, and the estates in, of easements, of landlord and tenant, of fixtures, of water-courses in general, of navigable waters, of surface waters, of pollution of waters, of ferries, of nuisances, of mortgages, of the assignment of a mortgage, of the rights, interest and liabilities of parties to mortgages, of the assumption of the mortgage, subrogation and merger, satisfaction and discharge, redemption, foreclosure, with a very complete series of articles on chattel mortgages, of their registration, and the rights and liabilities of parties to chattel mortgages, and of liens in general. It treats also of the subject of descent and distribution, of wills, their execution, attestation and probate, of legacies and devises, and of the revocation, republication and revival of wills. It also contains chapters (beginning the subject of remedies and procedure which is to be completed in volume 7), on arbitration and award. In the examination of these volumes one cannot but be impressed with the remarkable quality of clearness and conciseness which pervades the text throughout, enabling the author to state the general propositions of

law within a narrow compass, and at the same time the exhaustive character of the citation in the notes. Few men, we are led to believe, would be able to state the substantive doctrines of the law as it exists in this country to-day within the same number of volumes as has been done by Mr. Lawson, and also group the larger part of the decisions sustaining it. It will not be contended, of course, that the law, as stated by Mr. Lawson in these volumes, is as completely stated, so far as the niceties are concerned, as will be found in all the text-books on the same subjects. But the owner of this series will have at hand within the compass of seven volumes an accurate and thorough presentation of the general principles of the substantive law backed up by the most important cases. The printing and binding of these volumes is in every respect first class.

Books Received.

THE RULES OF PLEADING UNDER THE CODE, and the Practice Relating to Pleading, with an Appendix of Forms. By Edwin Baylies, Counsellor-at-Law, Author of "Baylies' Trial Practice," "Baylies on New Trials and Appeals," etc., etc. Rochester, N. Y.: Williamson Law Book Company, Successors to Williamson & Higbie, Law Booksellers and Publishers. 1890.

A TREATISE ON THE RIGHTS OF PERSONS and the Rights of Property, with the Remedies for the Protection and Enforcement of those Rights. By Oliver L. Barbour, LL.D., Author of "Barbour's Criminal Law," "Barbour's Chancery Practice," "Barbour's New York Supreme Court Report," etc., etc. In Two Volumes. Vols. I and II. Rochester, N. Y.: Williamson Law Book Co., (Successors to Williamson & Higbie), Law Booksellers and Publishers. 1890.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW. Compiled under the editorial supervision of John Houston Merrill, late editor of the American and English Railroad Cases and the American and English Corporation Cases. Volume XII. and XIII. Northport, Long Island, N. Y.: Edward Thompson Co. Law Publishers. 1889.

QUERIES.

Query No. 6.

According to the law of Kansas, a married woman who dies intestate, owning real estate, her husband in any event inherits one-half thereof; but the husband is convicted in a court of competent jurisdiction of the murder of his wife; will his deed to one-half of the real estate be valid to a purchaser who has notice of these facts? *Deed made before conviction.*

THOS. P. FENLON.

Query No. 7.

Sec. 1212.—"All conveyances whatsoever, of lands, etc., * * * and all deeds of trust, etc., shall be void as to *all creditors* * * * without notice, unless lodged with the chancery clerk to be recorded."

Sec. 1257.—"The exempt property, real and personal, may be disposed of, as any other property may be, by the owner, and shall not by such disposal become liable to the debts of such owner. * * *"

Does section 1212 apply to or include a conveyance of a homestead (exempt from sale under execution), made by the owner after judgment has been rendered against him, but deed not filed for record till after the property ceases to be a homestead of the judgment debtor's, and subsequent to the levy of execution under such judgment and properly advertised for sale? The question is, as to effect of withholding the deed from record. The conveyance in good faith, and no lien existing on property when deed made, because exempt. Cite authorities.

INQUIRER.

HUMORS OF THE LAW.

Great Lawyer—"I am tired to death."

Sympathetic Wife—"You look tired. What's been the matter?"

"I've been making my speech for the defense for three days now, and, tired or not, I'll have to go right along with it to-morrow and perhaps the next day."

"Can't you cut it short?"

"Not until the jury have had time to forget the evidence against my client."

"I wish to ask this court," said a lawyer who had been called to the witness-box to testify as an expert, "if I am compelled to come into this case, in which I have no personal interest, and give a legal opinion for nothing?"

"Yes, yes, certainly," replied the mild-mannered judge; "give it for what it is worth."—*Green Bag.*

"Willie," said a lawyer to his son, "did I hear you swearing this afternoon?" "No, father. I may have been affirming with unnecessary emphasis, but I wasn't swearing."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNTING—Mistake.—A mistake of fact in an accounting between copartners upon dissolution of the partnership affords ground for relief in equity, irrespective of any express agreement that mistakes should be corrected.—*Cobb v. Cole*, Minn., 46 N. W. Rep. 364.

2. ADVERSE POSSESSION.—A party claiming to be the owner of premises is chargeable with notice of any equities or rights of other parties, as disclosed by the record of his own title, and, after a reasonable time, with actual notice of the open and continuous possession of a mortgagee in possession.—*Jellison v. Halloran* Minn., 46 N. W. Rep. 332.

3. ADVERSE POSSESSION.—Where plaintiff and defendant claim title under the same grantor, 10 years' adverse possession by plaintiff under an unacknowledged deed, prior to the grant to defendant, will establish a superior title by prescription.—*McInery v. Irvin*, Ala., 7 South. Rep. 841.

4. APPEAL—Findings.—Under Rev. St. Ind. 1881, § 5778, providing that the circuit court, on appeals from the board of comissioners, "may make a final determination of the proceedings, * * * and cause the same to be executed, or may send the same down to such board, with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises," it may remand a ditch case to the board for their action where it has determined the utility of the ditch, and the illegality of the order establishing it; they being the only questions presented.—*Sharp v. Malia*, Ind., 25 N. E. Rep. 9.

5. ARBITRATION—Submission.—When in a pending suit the case is referred to arbitrators, no statement in writing signed by the parties of the matter in dispute, as required by Code Ala. § 3223, is necessary, as that section only applies to disputes submitted when no suit is pending.—*Snodgrass v. Ambester*, Ala., 7 South. Rep. 840.

6. ASSIGNMENT FOR BENEFIT OE CREDITORS—Partnership.—An assignment of firm property which requires releases from all accepting creditors, and in which a nominal partner does not join, is void as to firm creditors the same as it would be if the nominal partner were an actual one, since the partner who made the assignment, and who represented the other to be his copartner, is estopped from denying the copartnership.—*Turner v. Douglass*, Tex., 14 S. W. Rep. 221.

7. ASSUMPSIT—Evidence.—A claim, the payment of which has remained undemanded more than 10 years, cannot be recovered unless the testimony is direct and uncontradicted.—*Foote v. Godwin*, La., 7 South. Rep. 844.

8. ATTACHMENT—Appealable Order.—An order dissolving an ancillary attachment is a final judgment at law, from which an appeal lies. An order dissolving an ancillary attachment is a final judgment, although it does not expressly dismiss the attachment proceedings. Lyman v. Alexander, 9 Fla. 489, disapproved.—*Williams v. Hutchinson*, Fla., 7 South. Rep. 852.

9. BOUNDARIES—Courses and Distances.—Ordinarily, calls for natural or artificial monuments will control courses and distances; but a call for course and distance will not be subordinated to a call for an unmarked line in a prarie, which cannot itself be ascertained except by running the boundaries of another survey according to course and distance.—*Johnson v. Archibald*, Tex., 14 S. W. Rep. 266.

10. CARRIERS—Live-stock.—Carriers of live-stock are relieved from liability for injuries resulting from the natural propensity of animals to injure themselves or each other.—*Boehl v. Chicago, M. & St. P. Ry. Co.*, Minn., 46 N. W. Rep. 333.

11. CERTIORARI—Judgment.—A writ of *certiorari* will not lie before the entry of judgment to review proceedings in district court in the matter of special assessments against real property alleged to have been benefitted by the improvement of a street.—*State v. District Court*, Minn., 46 N. W. Rep. 349.

12. CHATTEL MORTGAGE—Growing Crops.—A chattel mortgage upon growing crops *held* valid, and the record thereof constructive notice to the purchaser of the grain when harvested. After condition broken, the mortgagee, unless it is otherwise stipulated, becomes immediately vested with the right of possession of the mortgaged property, and the purchaser in possession will be liable as for a conversion, upon his refusal to deliver the same on demand.—*Close v. Hodges*, Minn., 46 N. W. Rep. 335.

13. CONDEMNATION—Park Fund.—Under the provisions of the act creating a park board for the city of St. Paul, he compensation for land taken for parks is to be paid out of a special fund called a "park fund," made up of the proceeds of a limited number of bonds of the city and assessments for benefits to the amount of 50 per cent. upon lands benefited, and is not made a general charge upon the treasury of the city.—*Godfrey v. District Court*, Minn., 46 N. W. Rep. 355.

14 CONSTITUTIONAL LAW—Legislative Functions.—Act N. J. April 7, 1888, which provides that the board of chosen freeholders of any county, when they deem it expedient to lay out or improve a public road through such county, may by resolution submit the question of so doing to the electors of the county, and that if a majority of their votes are cast in its favor the subsequent provisions of the law shall become operative in such county, is not such a delegation of legislative power as is in contravention of Const. N. J. art. 4, § 1, par. 1, vesting the legislative power of the State in the senate and general assembly.—*State v. Board*, N. J., 20 Atl. Rep. 255.

15. CORPORATIONS—Stock Certificate.—A stock certificate issued by a corporation having power so to issue, in which it is stated that a designated person is the owner of a certain number of shares of stock transferable only on the books of the association, on the indorsement and surrender of the certificate itself, is a continuing affirmation as to the ownership of the stock, and that the corporation will not transfer the stock upon its books unless the certificate is first surrendered.—*Joslyn v. St. Paul Distilling Co.*, Minn., 46 N. W. Rep. 337.

16. CORPORATION—Stockholders.—When a corporation, by virtue of its charter, pays for property purchased with its capital stock, such sale cannot be set aside, in the absence of fraud, on the ground that the value of such property was not equal to the value of the stock.—*Bickley v. Schlag*, N. J., 20 Atl. Rep. 250.

17. COURTS—Clerical Errors in Record.—Code Civil Proc. Colo. § 75, which permits a court, in certain cases, to relieve a party from a judgment, order, or other proceedings, where he applies for the relief within six months after the adjournment of the term at which such judgment, order, or proceeding was taken, does not deprive the court of its inherent right to correct a clerical mistake in the record of a cause at the instance of a party who had not discovered the error until after the expiration of six months from the rendition of judgment.—*Pleyte v. Pleyte*, Colo., 24 Pac. Rep. 579.

18. COURTS—Judgments.—Const. Cal. art. 11, § 8, which provides for the adoption of city charters by mere resolution of the legislature, without the approval of the governor, was not intended to supersede the provisions of article 6 in relation to the establishment of inferior courts, and that the provisions of the charter of the city of Los Angeles, so adopted, establishing a police court, and defining its jurisdiction, are void.—*People v. Toal*, Cal., 24 Pac. Rep. 603.

19. COURTS—Jurisdiction.—A State court has no jurisdiction of an action by one non-resident against another for trespass on land outside of the State, since such an action is local.—*Morris v. Missouri Pac. Ry. Co.* Tex., 14 S. W. Rep. 228.

20. CREDITOR'S BILL—Fraudulent Conveyance.—Where a creditor's bill does not seek to set aside his debtor's assignment for the benefit of creditors, and no fraud in making the assignment is shown, it is error to decree that the property assigned shall be held subject to a judgment and execution on the creditor's claim obtained after the commencement of the creditor's suit.—*Post v. Roach*, Fla., 7 South. Rep. 854.

21. CRIMINAL LAW—Assault with Intent to Kill.—On trial for assault with intent to kill, where the undenied evidence for the State shows that defendant told another that he would put a hole through the prosecuting witness unless he took back some lies that he had been telling on defendant, and that shortly after, when he appeared, defendant accused him of telling these lies, and immediately fired at him, it is proper to refuse an instruction looking to the conviction of defendant of a

lower grade of offense than that for which he is indicted, though he swears that he acted in self-defense, and had no intention of killing.—*State v. Musick*, Mo., 14 S. W. Rep. 212.

22. CRIMINAL LAW—Sentence.—Under Pen. Code Cal. § 19, making a misdemeanor punishable by imprisonment not exceeding six months, or by a fine not exceeding $500, or by both, and section 1205, providing that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine, the court may impose a fine of $500, with the alternative that in default of payment defendant be imprisoned at the rate of one day for each dollar of the fine.—*Ex parte Casey*, Cal., 24 Pac. Rep. 599.

23. CRIMINAL PRACTICE—Burglary.—The indictment charged the defendant with breaking and entering a building (store) in the night-time, with intent to commit a felony, to-wit, larceny, and the court charged the jury, if they found that the defendant broke and entered the building as charged in the indictment, they should convict: *Held*, that the charge referred to in the indictment in its entirety, the time of the breaking and entering being included, and was therefore not erroneous in not charging more specifically that the breaking and entering must be in the night time.—*Clifton v. State*, Fla., 7 South. Rep. 863.

24. CRIMINAL PRACTICE—Collateral Proceeding.—Where the judgment that the prisoner be confined in the house of correction shows on its face that the court found the prisoner to be under 25 years old, or is silent on the subject, neither the finding nor the presumption that she was under 25 years old (the court having no authority to commit one older than that) can be questioned on *habeas corpus*.—*Ex parte Williams*, Cal., 24 Pac. Rep. 602.

25. CRIMINAL PRACTICE—Intoxicating Liquors.—Where the words used in an indictment are equivalent to the words of the statute, and the indictment is sufficient to put the defendant upon full notice of the offense with which he is charged, the judgment will not be arrested upon the ground that the indictment was so vague and indefinite that the defendant was embarrassed and misled in his defense.—*Roberts v. State*, Fla., 7 South. Rep. 861.

26. CRIMINAL PRACTICE—Murder—Bail.—Under a constitution making all offenses bailable except "capital offenses, where the proof is evident or the presumption great," bail will be denied a person under indictment for murder where the evidence adduced is such that if a jury had found a verdict of guilty of a capital offense a judge would sustain the conviction, or refuse to grant a new trial. If the evidence is of less efficacy, bail should be granted.—*Thrasher v. State*, Fla., 7 South. Rep. 847.

27. DEATH BY WRONGFUL ACT—Limitations.—Where, in a suit by the widow for damages for the wrongful killing of her husband, the petition shows that the deceased left surviving him three children, whose claims against defendant are barred by the statute of limitations, defendant cannot, on appeal, object that the action should have been brought for the benefit of the children as well as of the widow.—*Paschall v. Owen*, Tex., 14 S. W. Rep. 203.

28. DEDICATION—Streets.—Where a tract of land is actually surveyed into blocks, lots and streets, the effect of a conveyance to purchasers of separate lots and blocks according to such survey is to dedicate the streets therein to public use, independently of any statutory dedication. And where the plat of such survey fails to comply with the statutory directions, so as to entitle it to be recorded, it may nevertheless be referred to for the purpose of describing lots or blocks, and parol evidence is admissible to apply the descriptions in the deeds to the subject-matter.—*Bohrer v. Lange*, Minn., 46 N. W. Rep. 358.

29. DEED—Description.—An express exception, in a deed conveying lands described by metes and bounds, of "lot 6, block 36, heretofore conveyed to William H. Brown" by the grantors, *held* to be effectual to except the designated lot from the lands conveyed, it appearing that the grantedlandshad been platted by the grantor and grantee, although the plat had not been acknowledged or recorded; that the plat embraced a lot so designated; and that the granted lands did not include any other lot 6, in a block 36.—*Ambs v. Chicago, St. P., M. & O. Ry. Co.*, Minn., 46 N. W. Rep. 321.

30. DEED—Description.—Where there is doubt or uncertainty arising from the terms of the descrrption in a deed, or in the application thereof to the subject-matter, the court may place itself in the position of the grantee, and read it in the light of the circumstances under which it was executed, and may consider the condition of the property, state of the title, boundaries or other material matters in aid of its interpretation.—*Cannon v. Emmons*, Minn., 46 N. W. Rep. 356.

31. DEPOSITION—Witness.—The caption to a deposition and the certificate of the officer as follows: "Answers to interrogatories propounded to B." "Sworn to and subscribed before me this day,"—do not show that the answers were signed by the witness before the officer, and the deposition should be suppressed.—*Bush v. Barron*, Tex., 14 S. W. Rep. 238.

32. DIVORCE—Cruelty.—Divorce on the ground of extreme cruelty will be denied where there is no actual bodily violence, unless the treatment or abuse or neglect or bad conduct complained of be such as damages health, or renders cohabitation intolerable and unsafe, or unless there are threats of mistreatment of such flagrant kind as to cause reasonable and abiding apprehension of bodily violence, so as to render it impracticable to discharge marital duties.—*Palmer v. Palmer*, Fla., 7 South. Rep. 864.

33. ELECTIONS AND VOTERS—City Council.—Rev. St. Tex. art. 367, provides that each city council shall be the judge of the election and qualification of its own members. Article 342 authorizes the council to pass ordinances necessary for the general welfare of the city, and article 418 authorizes it to pass all ordinances necessary to carry into effect the powers vested in the corporation: *Held*, that a city council had no jurisdiction to determine a contest of an election for a city marshal, though it had passed an ordinance providing that it might do so.—*Vosburg, Mayor, v. McCrary*, Tex., 14 S. W. Rep. 195.

34. EMINENT DOMAIN—Damages.—There is no inflexible rule of law defining how much a witness must know about property before he can be permitted to testify as to its value. It must appear on the preliminary examination that he has knowledge on the subject sufficient to enable him to form an estimate of its value, and such as it may be supposed the jury do not have. It is then for the court to determine the question of his competency; and if the evidence is received the jury will determine the weight and worth of it, in view of all the circumstances as developed on the examination.—*Papooshek v. Winona & St. P. R. Co.*, Minn., 46 N. W. Rep. 329.

35. EMINENT DOMAIN—Street Improvements.—Under the charter of the city of St. Paul, the city has no right to enter upon and improve lands for a public street, and assess benefits for such improvements as against the owner of such lands, while separate proceedings for the condemnation thereof for public use are pending upon appeal, unless it has caused to be executed the proper bond as authorized by the charter.—*Hennessy v. City of St. Paul*, Minn., 46 N. W. Rep. 353.

36. ESTOPPEL—Judgment.—No party is, as a general rule, bound in a subsequent proceeding by a judgment unless his adversary, seeking to secure the benefit of the former adjudication, would have been prejudiced by it had it been determined the other way. The operation of estoppel must be mutual. Both litigants must alike be concluded, or the proceedings cannot be set up as conclusive on either.—*Nowack v. Knight*, Minn., 46 N W. Rep. 348.

XUM

37. EVIDENCE—Account.—In an action on an account, a copy of the last page from the book of original entries, containing the footing of the entire account, to the correctness of which the debtor did not object on its exhibition to him, is admissible in evidence as an admission by him, though it is incompetent as an original entry.—*Snodgrass v. Caldwell*, Ala., 7 South Rep. 834.

38. EVIDENCE—Declaration.—Declarations of deceased persons are admissible to prove the relationship of the declarants to another person, also deceased.—*Lowder v. Schluter*, Tex., 14 S. W. Rep. 205.

39. EVIDENCE — Declarations.—Declarations which would be admissible if the party making them were dead are equally admissible when he is in such physical condition as to be unable to testify either in court or by deposition.—*Griffith v. Sauls*, Tex., 14 S. W. Rep. 230.

40. EVIDENCE—Profit.—It is not reversible error to allow a witness to state what was the clear profit on a particular transaction, after he has testified fully as to the items of receipts and disbursements in the transaction.—*Glass v. Wiles*, Tex., 14 S. W. Rep. 225.

41. EXECUTION—Exemption.—The owner of a horse levied upon may avail himself of the right to select that horse for exemption, without bringing his other horses from another county, so that the officer may levy upon them.—*Anderson v. Ege*, Minn., 46 N. W. Rep. 362.

42. EXECUTORS AND ADMINISTRATORS—Liabilities.—An administrator, when sued for misappropriation of the funds of the estate, may show that he paid such funds to the heirs and distributees, the estate being solvent, and the payments made being less than the respective shares of the heirs, though said heirs have not been made parties to the suit.—*Oglesby v. Forman*, Tex., 14 S. W. Rep. 244.

43. FALSE REPRESENTATIONS.—Under Civil Code Cal. § 1572, subd. 2, a finding that defendant, by false and fraudulent representations as to soundness, induced plaintiff to purchase a horse from him, is supported by evidence that the representations were in fact not true, and that defendant made them without reasonable grounds for believing them to be true.—*Mayer v. Salazer*, Cal., 24 Pac. Rep. 597.

44. FEDERAL COURT—Jurisdiction.—Where a petition for *mandamus* of which a State court has jurisdiction is removed to the federal court, the latter will have jurisdiction of the suit, though it would be beyond its jurisdiction if originally brought therein.—*People v. Colorado Cent. R. Co.*, U. S. C. C. (Colo.), 42 Fed. Rep. 638.

45. FRAUDULENT CONVEYANCES.—Plaintiff's ancestor deposited money with defendant and afterwards used such deposit as collateral security for loans from the bank in which defendant had placed the money. Plaintiff's ancestor was insolvent at the time, but there was no direct evidence that he intended to defraud his creditors. After he had died intestate plaintiff sued for the money: *Held*, that she was entitled to recover.—*Kinney v. Watson*, Tex., 14 S. W. Rep. 207.

46. FRAUDULENT CONVEYANCES.—The fact that the seller was insolvent and intended to defraud his creditors does not render the sale fraudulent where it appears that the purchaser bought in good faith for a fair price, and that he did not know that the seller was insolvent.—*Tillman v. Heller*, Tex., 14 S. W. Rep. 271.

47. FRAUDULENT CONVEYANCE—Husband and Wife.—In a controversy between a wife and the creditors of the husband, she is bound to establish the facts of which she has the burden of proof by a preponderance of testimony only: and an instruction is properly refused that, to show that he acted as her agent in the purchase of a stock of goods, and in conducting the business, "the evidence must be clear and satisfactory, and sufficiently strong to remove the equivocal character in which she is placed by reason of her relation of wife."—*Laird v. Davidson*, Ind., 25 N. E. Rep. 7.

48. GRANTS—Spanish.—The governor of the province of Texas having, in 1818, granted to an individual land within the limits of a cession made about 1733 by the king of Spain to the city of San Antonio, it will be presumed that the cession did not deprive the Spanish government of power to confer title on individuals, and that the grant by the provincial governor was within his authority.—*Dittmar v. Dignowity*, Tex., 14 S. W. Rep. 268.

49. GUARDIAN AND WARD—Care of Estate.—Where a portion of the ward's estate consists of bank-stock, and the guardian, after careful investigation, believes the investment unsafe, and sells the stock, and, on the advice of able financiers and his own judgment, invests the proceeds in good faith in the stock of a solvent bank, his bond will not be liable for a loss resulting from a failure of the latter bank.—*Durett v. Commonwealth*, Ky., 14 S. W. Rep. 189.

50. GUARDIAN AND WARD—Sale.—A sale by a guardian of his ward's land under the direction of the probate court, after being confirmed by said court, is not open to collateral attack on the ground that the order of confirmation was not made at the term to which the guardian had been ordered to make a report of the sale and that the time of sale was extended without the issuance of any additional citation.—*Butler v. Stephens*, Tex., 14 S. W. Rep. 202.

51. HABEAS CORPUS—Jurisdiction.—Code Ala. § 4201, gives the county court jurisdiction of misdemeanors, and its judgment of conviction for a misdemeanor is valid though the court may have conceived that it was acting under an unconstitutional statute, (Act Feb. 20, 1889).—*In re Gibson*, Ala., 7 South. Rep. 833.

52. HOMESTEAD.—Where an application by the administrator for an order of sale of the land to pay a debt of decedent's that is not subject to any exemption is denied, and the widow's invalid claim of homestead exemption allowed, and the estate is subsequently declared insolvent, the creditor cannot subject the land to his debt after the widow's death, as the order allowing the homestead exemption, from which no appeal was taken, is final, and decisive of his rights.—*McDonald v. Berry*, Ala., 7 South. Rep. 838.

53. HOMESTEAD—Abandonment.—A married man built on one part of a block a house, which he and his family occupied as a residence, and in which they also carried on the hotel business. He thereafter built a store on another part of the block, in which he carried on the grocery business. The buildings were so occupied for several years, when the residence was rented, and the family moved into the rear of the store. On account of the husband's ill health the grocery was closed, and the wife opened a millinery business in the front part of the store. The husband then died: *Held* that, the entire property being exempt as a homestead while they were occupying the residence, and using the store for business, it would not be presumed that it had been abandoned, or that the change was more than temporary.—*Harle v. Richards*, Tex., 14 S. W. Rep. 257.

54. HOMESTEAD—Burden of Proof.—Under Insolvent Act. Cal. § 60, which makes it the duty of the insolvency court to exempt and set apart a homestead for the benefit of the insolvent, the value of which is limited to $5,000 by Civil Code, § 1260, the burden of proof is on the creditors to show that the value of the homestead which the insolvent petitions to have set apart to him exceeds that amount.—*Demartin v. Demartin*, Cal., 24 Pac. Rep. 594.

55. HOMESTEAD—Claim Against Decedent.—Under Code Civil Proc. Cal. § 1475, requiring all claims secured by liens or incumbrances on the homestead of a person deceased to be presented and allowed as other claims against the estate, a complaint, in an action on a note given by defendant and her deceased husband, and secured on their homestead, which asks for a personal judgment and a sale of the mortgaged property, is bad on general demurrer, where it fails to allege that the claim had been presented for allowance.—*Hearn v. Kennedy*, Cal., 24 Pac. Rep. 606.

56. HOMESTEAD—Estoppel.—The mortgage under

which plaintiff in ejectment claimed title conveyed lands which defendant (the mortgagor) had received in exchange for his homestead, and on which he was building and intended to move, and was joined in by a woman whom he had married supposing himself legally divorced from his former wife, who had deserted him. Having subsequently discovered that he was not divorced he renewed proceedings, and obtained a decree three days after the expiration of the time for redemption from a foreclosure sale: *Held*, that defendant could not be heard to say that the mortgage conveyed his homestead, and was void because not signed by his wife.—*Trout v. Rumble*, Mich., 46 N. W. Rep. 367.

57. HOMESTEAD—Forfeiture.—Where one leases part of the realty set apart as a homestead, for mining purposes, the lessee to pay a certain amount on the ore mined, or, in case the land is not worked, to pay a stipulated forfeiture, such forfeiture, if due, is profits arising from the homestead, within Code Ga. § 2026, providing that "all produce, rents, or profits arising from homesteads in this State * * * shall be exempt from levy and sale.—*Lairey v. Baker*, Ga., 11 S. E. Rep. 800.

58. INJUNCTION AGAINST EJECTMENT.—Possession of lands by vendee under a valid contract of sale, by act or permission of vendor, with part payment of consideration, and improvement of the property with the assent of vendor, being an equitable interest, of which he could not avail himself as a defense in an action of ejectment, will, if satisfactorily established, entitle vendee to an injunction restraining the enforcement of a judgment in such action.—*Nibert v. Baghurst*, N. J., 20 Atl. Rep. 252.

59. INSOLVENCY—Contract.—A contract entered into between the appellant (plaintiff) and the assignors of the respondent, under the insolvency act, considered and construed: *Held*, that by reason of said contract, and its terms and conditions, appellant cannot be permitted to participate as a creditor in the distribution of the assets of the insolvents.—*Clark v. Lindeke*, Minn., 46 N. W. Rep. 339.

60. INSOLVENCY—Discharge.—Insolvent Act. Cal. § 49, which provides that no discharge shall be granted if the debtor shall have sworn falsely in relation to any material fact concerning his estate or his debts, imposes no penalty for an unintentional and innocent mistake; and the fact that in his verified schedule of liabilities a debtor in good faith understated the amount due one of his creditors, and likewise omitted a small item from his verified inventory of assets, by neither of which errors were his creditors prejudiced, will not prevent his discharge.—*Demartin v. Demartin*, Cal., 24 Pac. Rep. 596.

61. INSURANCE—Proof of Loss.—A condition in a fire policy that a loss shall be paid "sixty days after due notice and proof of the same, made by the assured, are received at the office of the company," is waived by an absolute denial on the part of the company of any liability, and the assured need not wait 60 days before suing therefor.—*California Ins. Co. v. Gracey*, Colo., 24 Pac. Rep. 577.

62. JUDGMENT—Collateral Attack.—Where the record of a justice of the peace does not show whether a defendant against whom judgment was rendered by default had been served with process, it may be shown by parol evidence that he was not served.—*Wilkerson v. Schoonmaker*, Tex., 14 S. W. Rep. 223.

63. JUDGMENT—Publication of Process.—A decree of partition may be rendered against not-resident defendants upon service by publication, but judgment for costs cannot be rendered against them in such action where they have not appeared nor been personally served with process.—*Talliaferro v. Butler*, Tex., 14 S. W. Rep. 191.

64. LIMITATION OF ACTIONS.—Where plaintiff, in an action in the federal court on county bonds, declares on fictitious bonds in addition to those held by him, merely for the purpose of giving the court jurisdiction of the amount, and takes a voluntary nonsuit, the institution of such suit, and bringing of another suit within one year, as provided by Rev. St. Mo. § 6784, does not arrest the running of the statute of limitations. The equitable construction given the statute allowing a new action after suffering a nonsuit cannot be invoked by one who knowingly practices a fraud on the jurisdiction of the court.—*Hardin v. Cass County*, U. S. C. C. (Mo.), 42 Fed. Rep. 652.

65. LIMITATION—Presumption.—No presumption of satisfaction of a judgment for the possession of land rendered in an action to recover it for the non-payment of rent reserved on a manorial lease in perpetuity arises from the lapse of 20 years witout its enforcement.—*Van Rensselaer v. Wright*, N. Y., 25 N. E. Rep. 3.

66. LIMITATION AGAINST THE STATE.—In the absence of an express statutory provision, the statute of limitations does not run against the State; and the fact that the State is expressly excepted from the limitation of suits for land raises no presumption that it is subject to the limitations as to other suits.—*Brown v. Sneed*, Tex., 14 S. W. Rep. 248.

67. MANDAMUS—Judgment.—The holders of a judgment against a county obtained a writ of *mandamus* commanding the supervisors to levy a tax to discharge the judgment. The decree awarding the writ was reversed by the supreme court, and the cause remanded, whereupon an amended petition for *mandamus* was filed. Pending the proceedings in the supreme court the period during which, under Code Iowa, § 3025, an execution could issue on the judgment, expired: *Held*, that the collection of the judgment could not be enforced by *mandamus*, since the judgment was no longer operative, and the pendency of the *mandamus* proceedings created no lien.—*McAleer v. Clay County*, U. S. C. C. (Iowa), 42 Fed. Rep. 665.

68. MARRIAGE—Insanity.—The courts are not authorized to decree a marriage contract void on the ground of the insanity of one of the parties, except for such want of understanding in such party as to render him or her incapable of assenting thereto. And though such person may be subject to some vice or uncontrollable impulse or propensity, yet, if otherwise sane, and able to understand the nature and obligations of the marriage contract, a decree of nullity will not be granted.—*Lewis v. Lewis*, Minn., 46 N. W. Rep. 323.

69. MASTER AND SERVANT—Dangerous Machinery.—It is not an actionable negligence *per se* as between master and servant to omit to protect or cover dangerous machinery, but the question of negligence must depend upon the circumstances of each case, such as the nature of the employment, degree of exposure to danger, and notice thereof to the employee.—*Carroll v. Williston*, Minn., 46 N. W. Rep. 352.

70. MASTER AND SERVANT—Negligence.—A draw-head pulled out while the train was running. The spring attached to it, which prevents the cars coming so close together as they otherwise would, dropped out, and was not found, and, under orders of the baggage master, who was his superior, the brakeman replaced the draw-head without it. During the run he made a coupling between that car and a stock-car, which, like the others of its class on the road, had no bumpers. It being night, he did not observe that one of the cars had the defective draw-head, and he was caught between the two, and injured. He had been 18 months in the service: *Held*, that there was no evidence of negligence on the part of the company.—*Houston & T. C. Ry. Co. v. Barrager*, Tex., 14 S. W. Rep. 242.

71. MINES AND MINING.—Where defendants' mining claim is in the form an isosceles triangle, they cannot follow their lode or vein on its downward dip, through the side lines of their claim, into plaintiff's claim. Parallelism in the end lines of the claim is essential to the exercise of such right.—*Montana Co. v. Clark*, U. S. C. C. (Mont.), 42 Fed. Rep. 626.

72. MORTGAGE—Foreclosure.—Where in proceedings to foreclose a mortgage by action a second

mortgagee is not made a party, a subsequent action may be brought to bar his equity, subject to his right of redemption; and, if such subsequent incumbrancer is a non-resident absentee, the statute of limitations will be suspended as to him.—*Foster v. Trowbridge*, Minn., 46 N. W. Rep. 350.

73. MORTGAGE—Record.—Under Rev. St. Tex. § 4334, providing that mortgages shall be valid from the time they are filed for record, and the like provisions of sections 4299, 4332, an absolute deed intended as a mortgage, but recorded in a book of deeds, is valid against purchasers and creditors, though section 4304 provides that mortgages shall be recorded in separate books.—*Kennard v. Mabry*, Tex., 14 S. W. Rep. 272.

74. MORTGAGE—Redemption.—After the lapse of more than 20 years from the date of the transaction the court will not entertain a suit to have a deed absolute on its face declared a mortgage, and for an accounting, where the note secured by such deed is simply alleged not to have been due at the date of the deed.—*Miller v. Smith*, Minn., 46 N. W. Rep. 324.

75. MUNICIPAL ASSESSMENTS—Covenants.—Where the charter of a city declares that the taxes levied by the city council shall be a lien on property against which they are assessed, but does not fix the time when the lien shall attach, such taxes become a lien from the time when the assessment roll and the warrants for collection come into the hands of the receiver of taxes.—*Eaton v. Chesebrough*, Mich., 46 N. W. Rep. 365.

76. MUNICIPAL CORPORATIONS—Incorporation.—Pol. Code Cal. p. 737, § 2, providing the steps to be taken for the incorporation of municipalities containing not less than 500 inhabitants, requires a petition to the board of supervisors, signed "by at least 100 qualified electors of the county, residents within the limits of such proposed corporation," and that an election shall be ordered to decide on the matter of incorporation. Section 3 provides for canvassing the returns, and declaring the result: *Held*, that where, after the election, the board learned that only part of the 100 petitioners were *bona fide* residents, it could not be compelled to canvass the returns.—*Page v. Board of Supervisors*, Cal., 24 Pac. Rep. 607.

77. MUNICIPAL CORPORATIONS—Powers.—The town of New Decatur organized under Code Ala. §§ 1486, 1516, with the usual and ordinary municipal powers has no power to establish a quarantine against property and persons and a contract for services to be rendered in connection therewith is *ultra vires* and void.—*New Decatur v. Berry*, Ala., 7 South. Rep. 838.

78. NEGLIGENCE.—The owner, lessee, or occupant of premises is bound to use reasonable care in conducting his business, so as not to injure persons lawfully upon such premises.—*Ingalls v. Adams Exp. Co.*, Minn., 46 N. W. Rep. 325.

79. NEGOTIABLE INSTRUMENT—Pleading.—Where the defense set up in an answer to a complaint upon a promissory note is that the note was made by the defendant for the accomodation of the payee, proof that it was executed without any consideration is sufficient to establish such defense, and defeat a recovery as between the original parties. But evidence that the parties mutually agreed in writing, at the time of the execution of the note, that the maker should not be personally liable thereon, but that it should be paid out of the proceeds of other securities, is not admissible, under the answer to prove that the note was made for the accomodation of the payee.—*Lebanon Sav. Bank v. Penney*, Minn., 46 N. W. 331.

80. PARTITION—Defect of Parties.—A decree in partition, to which all the co-tenants are not parties, will be reversed on appeal though no objection for defect of parties was made until the decree was amended at a term subsequent to that at which the trial was had.—*Holloway v. McIlhenny Co.*, Tex., 14 S. W. Rep. 240.

81. PARTITION—Jurisdiction.—A sale in partition among joint tenants made by the probate court, under Code Ala. 1876, § 3514, is valid as to a judgment creditor o one of the joint tenants whose lien was acquired before the application for partition was filed, for such creditor is not a necessary party to the proceeding for partition.—*Inman v. Prout*, Ala., 7 South. Rep. 842.

82. PARTNERSHIP—Dissolution.—In order to effect a dissolution of a partnership it is not necessary that there be a distinct agreement between all the members at the same time that a dissolution shall take place at a certain time; an explicit notice from one member to the others fixing the time for such dissolution is sufficient.—*Green v. Waco State Bank*, Tex., 14 S. W. Rep. 253.

83. PARTNERSHIP—Executor.—Where the executor of a deceased partner, in compliance with directions in the testator's will, continues the partnership business with the surviving partner, with the testator's assets, and for the benefit of the estate, he does not thereby become personally liable for debts contracted by the firm during the life of the deceased partner; nor does the fact of his so continuing the business give the surviving partner any implied authority to bind him for such debts.—*Mattison v. Farnham*, Minn., 46 N. W. Rep. 347.

84. PATENTS FOR INVENTIONS—Assignment.—A patentee who grants a license to manufacture and sell the patented article, under a contract by which the licensee is to make monthly reports, and pay a stipulated royalty, and for failure to comply with which the licensor may declare a forfeiture, cannot sue in equity to compel the licensee to make reports and account for royalties due, or, on his failure to do so, to enjoin him from further manufacture or sale. By such prayer he waives the forfeiture clause, and is left to his action at law for the royalties.—*Washburn & Moen Manuf'g Co. v. Cincinnati Barbed Wire Fence Co.*, U. S. C. C. (Ohio), 42 Fed. Rep. 675.

85. PLEADING—Amendment.—In an action against several defendants upon a contract signed by one of them for the benefit of all, a joint answer was interposed which practically admitted the execution of the contract. Six years after the making of such answer, and after the evidence had all been taken, and some of the witnesses had died, one of the defendants asked leave to file an amended answer denying the authority of his co-defendant to execute the contract for him: *Held*, that the application came too late.—*Rice v. Ege*, U. S. C. C. (N. Y.), 42 Fed. Rep. 658.

86. PRINCIPAL AND SURETY—Contribution.—The right of a surety to contribution against his co-surety is not defeated by his payment of the debt, since the right to contribution is based on such payment, and not on the original debt.—*Jackson v. Murray*, Tex., 14 S. W. Rep. 235.

87. PRINCIPAL AND SURETY—Vendor's Lien.—The sureties are not bound on a note conditioned that it "is not to be delivered until signed by ten men of unqualified solvency," and accepted in good faith with the signatures of 10 men believed by the payee to be solvent, but not so in fact. In such case, the note being taken as collateral for the price of goods, they are, as between the parties, subject to a lien therefor.—*Campbell Printing Press & Manuf'g Co. v. Powell*, Tex., 14 S. W. Rep. 245.

88. PUBLIC LAND—Restriction on Alienation.—A legislative grant of a certificate for a league of land provided that the certificate should not be sold or transferred by the grantee, and that the land located by virtue thereof should be solely for the use of himself and his family: *Held*, that the grantee had power to sell the land after it was located.—*Norton v. Conner*, Tex., 14 S. W. Rep. 193.

89. QUIETING TITLE.—Where a tract of land lies part in one county and part in another, the circuit court of one county has jurisdiction to try an action to quiet title involving the question of whether a judgment rendered by the circuit court of the other county for the conveyance of the land is absolutely void.—*Howe v. Anderson*, Ky., 14 S. W. Rep. 216.

90. RAILROAD COMPANY—Eminent Domain.—The condemnation of land for depot grounds does not pass the

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fee to the railroad company. Where a railroad company permits a party to use part of the premises condemned for depot grounds for storing lumber shipped to him over the railroad until sold, and allows him to erect thereon an office, and a shed for protecting dressed lumber, the owner of the fee can recover from such party the rental value of the premises for a lumber yard, as the railroad company neither has the right to use the premises for such purposes, nor to permit others to so use them.—*Lyon v. McDonald*, Tex., 14 S. W. Rep. 261.

91. RAILROAD COMPANIES—Killing Stock.— The mere fact that a railroad is within the limits of an incorporated village does not exempt the company from the statutory duty of inclosing the track, where practicable, by fences and cattle guards. The fact that it is necessary to leave the track uninclosed at a particular place does not justify the neglect to inclose it beyond that place.—*La Paul v. Truesdale*, Minn., 46 N. W. Rep. 363.

92. RAILROAD COMPANIES—Killing Stock.—The report of an employee of the company as to the killing of an animal, if admissible as evidence on behalf of the company, is not so unless it be shown that it was the duty and business of the employee to make such report, and that it was made contemporaneously with the occurrence. Nor should the oral testimony of the employee be stricken out on the ground that his report is better evidence.—*Jacksonville, T. & K. W. Ry. Co. v. Wellman*, Fla., 7 South. Rep. 845.

93. RECOGNIZANCE— Forfeiture.— An action upon a recognizance cannot be maintained without entry of forfeiture as required by statute, §§ 1721, 1722.—*McGuire v. State*, Ind., 25 N. E. Rep. 12.

94. RESCISSION—CONTRACT.—It is an invariable rule that the right to rescind a contract on the ground of fraud may be exercised upon the discovery thereof; but any act of ratification, after knowledge of facts authorizing a rescission, amounts to an affirmance, and terminates the right to rescind.—*Crook v. Nippolt*, Minn., 46 N. W. Rep. 349.

95. SALE—Warranty.—Where defendant testifies that the sale of a machine to him and the execution in payment therefor of the notes sued on were induced by fraud, and that there was a latent defect in the machine known to plaintiff at the time, it is not error for the court to read to the jury Code Ga. § 2654, defining latent defects, and sections 3173-3175, relating to false representations, fraud and the suppression of truth.—*Cochran v. Jones*, Ga., 11 S. E. Rep. 811.

96. SALE—When Title Passes — Fraudulent Conveyance.—Where the price of each article in a stock of goods in a store has been agreed to, and the purchaser has exercised acts of ownership over the goods, and actually sold some of them, and has assumed payment of rent for the store, the fact that at night he left the key of the store in the hands of the seller, in order that he might have access to other goods in the same building which might be needed during the night, and that the inventory of the goods had not been footed up so as to ascertain the total price, does not render the sale and delivery incomplete.—*Davis v. Beeson*, Tex., 14 S. W. Rep. 198.

97. SPECIFIC PERFROMANCE—Improvements.—Possession of land worth $400 having been taken under a parol gift, permanent improvements, costing $187, cannot be treated as of comparatively no value, and specific performance will be decreed, though the value of the use and occupation has exceeded the cost of the improvements.—*Wells v. Davis*, Tex., 14 S. W. Rep. 237.

98. TENANTS IN COMMON—Use and Occupation.—A tenant in common in possession is not liable to his cotenant for use and occupation until the latter makes demand for possession.— *Thompson v. Jones*, Tex., 14 S. W. Rep. 222.

99. TRUST.—A bill will not lie to subject to the payment of his debts the interest of a *cestui que trust* under a will duly recorded devising land to a trustee to collect the rents, and pay the net proceeds to the testator's children; the jurisdiction in this respect being defined and limited by Code Tenn. § 4283, providing that a judgment creditor may file a bill to compel the discovery of any property held in trust for the debtor, except when the trust has been created by some one other than the debtor himself, and is declared by the will duly recorded.—*Porter v. Lee*, Tenn., 14 S. W. Rep. 218.

100. TRUSTS—Equity.—A conveyance of land to a relative, without consideration, upon an oral agreement to reconvey on demand, creates a trust enforceable in equity though the object of the conveyance was to prevent the property from being seized to satisfy a fine against the grantor for which the land could not have been legally taken.—*Cordova v. Lee*, Tex., 14 S. W. Rep. 208.

101. TRESPASS—Damages.—As against those who are guilty of a known and meditated trespass, a jury should estimate damages according to the amount which they think the most culpable should pay.—*Warren v. Westrup*, Minn., 46 N. W. Rep. 347.

102. TRESPASS TO TRY TITLE.—Plaintiff's petition alleged that he owned an undivided half of certain land, and prayed "for judgment for the recovery of said land:" *Held* that, as against defendant, who had shown no title, plaintiff, who had proved perfect title to half the land, and presumptive title to the other half, was entitled to judgment for the entire tract.—*Russell v. Oliver*, Tex., 14 S. W. Rep. 264.

103. TRESPASS TO TRY TITLE.—Where plaintiff and defendant derive title from the same grantor, plaintiff's deed being the elder, it cannot be shown in defense that there was a mistake in plaintiff's deed, and that it should not have included the land in controversy.—*White v. Kingsbury*, Tex., 14 S. W. Rep. 201.

104. TRESPASS TO TRY TITLE—Evidence.—Where the parties claim through a common source of title it is unnecessary for the plaintiff to prove his chain of title back of such common source.—*Lasater v. Van Hook*, Tex., 14 S. W. Rep. 270.

105. USURY—Action.—Where usurious interest has been voluntarily paid, the difference between such payment and the amount that would be due for interest at the highest legal rate may be recovered back, even in the absence of any statute authorizing such recovery.—*Bexar Building & Loan Ass'n v. Robinson*, Tex., 14 S. W. Rep. 227.

106. USURY—Chattel Mortgage.—Where a mortgage of chattels left in the possession of the mortgagor is void for usury or fraud, a seizure of the mortgaged property by the mortgagee, against the consent of the mortgagor, is wrongful, and an action will lie for the trespass.—*Kemmitt v. Adamson*, Minn., 46 N. W. Rep. 327.

107. USURY—Intent.—A contract for the loan of money for a stated time, at a rate of interest not usurious, is not avoided, and the original debt forfeited, by a contemporaneous agreement not intended as a means of evading the usury law, that at the option of the borrower the time of payment may be extended by the payment of more than the legal rate of interest for the period of the extension.—*Stein v. Swensen*, Minn., 46 N. W. Rep. 360.

108. VENDOR AND VENDEE—Contract.—An agreement between vendor and vendee, that, on the payment of a certain sum, the title to the property sold will be registered "free from all charges and incumbrances," is not a waiver by the vendor of his lien for the balance of the purchase money. Such agreement relates to the state of the title at that time, and not to anything growing out of the sale itself.—*Seymour v. Slide & Spur Gold Mines*, U. S. C. C. (Colo.), 42 Fed. Rep. 633.

109. VENDOR'S LIEN.—Where the vendee of land gives his note reserving a vendor's lien to a third person who had advanced the purchase money, and afterwards gives another note in renewal of the first, still reserving the lien, the lien may be enforced in favor of the holder of such second note.—*Johnson v. Townsend*, Tex., 14 S. W. Rep. 233.

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